No. 82-1204

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WER-COY FABRICATION COMPANY, INC.,
Petitioner,

-vs.-

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 292, AFL-CIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

MARSTON, SACHS, NUNN, KATES, KADUSHIN & O'HARE, P.C.
By: ROLLAND R. O'HARE
ANN E. NEYDON
BRUCE A. RICHARD
Attorneys for Respondent
1000 Farmer Street
Detroit, Michigan 48226
(313) 965-3464

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Sheet Metal Workers International Association, Local Union No. 292, AFL-CIO, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Sixth Circuit's decision in this case.

STATEMENT OF THE CASE

In 1979, petitioner Wer-Coy Fabrication Company, Inc. (hereinafter "Wer-Coy") joined the Associated Metal Fabricators and Engineers (hereinafter "AMFE"), and gave it a power of attorney to negotiate on Wer-Coy's behalf, thereby becoming bound to the collective bargaining agreement negotiated between the AMFE (which acts as bargaining agent for its member-employers) and respondent Sheet Metal Workers International Association Local Union No. 292, AFL-CIO (hereinafter the "Union") and then in effect. Wer-Coy later became bound to a successor contract negotiated by the AMFE and the Union effective June 1, 1980. Section 5(D) of the Addendum to these agreements (App., p. 1a) prohibits Wer-Coy from

discriminating against Union stewards in its shop in the performance of their duties; Section 5(K) of the Addendum (App., p. 1a; Petition, App., p. 5a) requires that Wer-Coy have just cause to discharge a steward.

On August 5, 1980, Wer-Coy discharged Anthony Dubich, a Union steward. The steward's discharge was later arbitrated under the agreement between Wer-Coy and the Union. In his Award (App., p. 2a), the arbitrator ordered the steward reinstated with back pay and benefits on three alternative grounds: that the discharge was "improper" (that is, it was without just cause); that the steward was discharged while "he was legitimately trying to perform his duties as a Union steward", and that he was discharged in violation of this Court's rule in *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 US 251, 256 (1975) that an employee be permitted union representation upon request when he reasonably believes that an interview with his employer may result in discipline. The arbitrator did *not* decide whether the contract required that Wer-Coy have just cause to discharge employees other than stewards.

Wer-Coy refused to abide by the arbitrator's Award. The Union then brought the present action in the U.S. District Court for the Eastern District of Michigan for enforcement under 29 USC §185. In its Answer to the Union's Complaint, Wer-Coy did not plead any defense of illegality to the enforcement of the Award (App., pp. 3a-5a). But later, in resisting the Union's motion for summary judgment, Wer-Coy argued that §5(K) of the agreement, upon which the arbitrator's holding that the discharge was without just cause rested, illegally discriminated in favor of the steward on the basis of union membership. Wer-Coy did not challenge the legality of the arbitrator's alternative grounds for ordering reinstatement. The District Court, however, held that the Award as a whole came within the presumption favoring enforcement of arbitration awards and granted the Union's motion (Petition, App., pp. 7a-8a).

Wer-Coy appealed to the U.S. Court of Appeals for the Sixth Circuit. The Sixth Circuit held, *inter alia*, that §5(K) of the agreement provided no seniority or other economic benefit to a union steward but simply protected the steward from discrimination by his employer (Petition, App., p. 4a).

REASONS WHY THE WRIT SHOULD BE DENIED

I.

NEITHER THE DECISIONS BELOW NOR THE RECORD RAISE THE QUESTIONS PRESENTED IN THE PETITION.

A. *Wer-Coy did not timely raise the affirmative defense of illegality in its Answer in the District Court below, and the question regarding the illegality of the contract which it seeks to present is not properly before the Court.*

The Petition claims, in essence, that "[t]he disputed contract clause is illegal and cannot form the basis for a valid arbitration award" (Petition, p. 3) and that the courts below therefore erred in granting and affirming summary judgment for the Union.

Wer-Coy, however, did not raise the affirmative defense of illegality by its Answer in the District Court below (App., pp. 3a-5a).

Under Rule 8(c) of the Federal Rules of Civil Procedure (App., p. 6a), "[i]n pleading to a preceding pleading, a party shall set forth affirmatively . . . illegality." The defense of illegality in an action to enforce an arbitration award under a collective bargaining agreement is waived if not pleaded in the Answer as required by Fed. Rules Civ. Proc. 8(c). *International Brotherhood of Electrical Workers* v. *Professional Hole Drilling, Inc.*, 574 F2d 497, 500 (10th Cir., 1978). The question presented by the Petition, as to whether Section 5(K) of the agreement between Wer-Coy and the Union is illegal, is therefore not properly before this Court. Cf. *Weinberger* v. *Salfi*, 422 US 749, 764 (1975) (affirmative defenses not timely raised as

required by Fed. Rules Civ. Proc. 8(c) need not be considered by this Court).

B. *Regardless of the legality of the disputed clause, the courts below had independent and adequate grounds to enforce the arbitration award.*

Federal law and national labor policy strongly favor the making and enforcement of arbitration agreements as a means of preserving industrial peace. *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 US 574, 578 (1960). The scope of judicial review of an arbitration award is narrow, and a mere ambiguity in the award raising a question as to whether the arbitrator exceeded his authority is not a reason to deny enforcement of the award. *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 US 593, 596, 598 (1960). A party attacking the legality of an arbitration award has the burden of sustaining such an attack, *Ormsbee Development Co.* v. *Grace*, 668 F2d 1140, 1147 (10th Cir., 1982), and only clear evidence of impropriety justifies denial of summary confirmation. Id.; *National Bulk Carriers, Inc.* v. *Princess Management Co., Ltd.*, 597 F2d 819, 825 (2d Cir., 1979).

In this case, the arbitrator held that the steward must be reinstated not only because Wer-Coy did not have just cause to discharge him, but also because it discharged him in the course of his performance of his duties as a steward [a violation not only of §5(D) of the Addendum (App., p. 1a), but also of 29 USC §158(a)(3), see, e.g., *May Dept. Stores Co.* v. *N.L.R.B.*, 555 F2d 1338 (6th Cir., 1977)]; and because it discharged him in violation of his rights under *N.L.R.B.* v. *J. Weingarten, Inc., supra.* Wer-Coy does not object in this Court, and made no objection below, that these latter two grounds rested on any illegal contract provision. As the Courts below would clearly have been entitled to enforce an award of reinstatement resting on either of those grounds alone, they were also clearly entitled to enforce the Award as rendered despite

any ambiguity or question as to the legality of §5(K) of the contract, on the basis of the adequate and independent grounds for reinstatement set forth in it. The questions presented by the Petition, therefore, are hypothetical. Even if they were resolved in Wer-Coy's favor, the decisions below would still stand unchanged.

II.

THE DECISIONS OF THE COURTS BELOW ENFORCING THE ARBITRATION AWARD ARE IN HARMONY WITH THE DECISIONS OF OTHER COURTS OF APPEALS AND THE NATIONAL LABOR RELATIONS BOARD: THE QUESTIONS PRESENTED BY THE PETITION, EVEN IF PROPERLY RAISED, ARE INSUBSTANTIAL.

A. *The courts agree that limited job-related benefits (such as superseniority for purposes of layoff and recall) which enable union stewards to maintain a continuous presence on the job are not unlawfully discriminatory under 29 USC § 158.*

Wer-Coy claims that while § 5(K) of the Addendum to the parties' agreement, as interpreted by the arbitrator, prohibits it from discharging union stewards without just cause, other employees are not so protected and may be discharged at will — and that this difference in treatment is of a type held presumptively unlawful and discriminatory by the National Labor Relations Board and Courts of Appeals other than the Sixth Circuit, thus creating a conflict between the circuits in this area of labor law.

Wer-Coy bases its argument on a line of cases stemming from *Dairylea Cooperative, Inc.*, 219 NLRB 656, 89 LRRM 1737 (1975), *enf'd sub nom. N.L.R.B.* v. *Milk Drivers, Local 338*, 531 F2d 1162 (2d Cir., 1976). In *Dairylea*, the NLRB held that a contract clause according a steward superseniority for all purposes, thus providing him with substantial job benefits seemingly unrelated to the performance of his responsibilities under the contract, was presumptively unlawful as impermis-

sibly encouraging union membership under 29 USC §§158(a)(3), 158(b)(2), and that the union would have to provide "proper justification" to rebut this presumption, 219 NLRB at 658.

The NLRB also held, however, that union steward superseniority limited to purposes of layoff and recall was of "well established" propriety and thus need *not* be specially justified by the union, because it

> furthers the effective administration of bargaining agreements on the plant level by encouraging the continued presence of the steward on the job. It thereby not only serves a legitimate statutory purpose but also redounds in its effects to the benefit of all unit employees. Thus, superseniority for layoff and recall has a proper aim and such discrimination as it may create is simply an incidental side effect of a more general benefit accorded all employees. *Id.* (footnote omitted).

In thus holding, the NLRB relied on *Aeronautical Industrial District Lodge 272* v. *Campbell*, 337 US 521 (1949), in which this Court held that:

> One of the safeguards insisted upon by unions for the effective functioning of collective bargaining is continuity in office for its shop stewards or union chairmen. . . . Because a labor agreement assumes the proper adjustment of grievances at their source, the union chairmen [or stewards] play a very important role in the whole process of collective bargaining. Therefore, it is deemed highly desirable that union chairmen have the authority and skill which are derived from continuity in office. A provision for the retention of union chairmen beyond the routine requirements of seniority is not at all uncommon and surely ought not to be deemed arbitrary or discriminatory. 337 US at 527-28.

As the Second Circuit noted in enforcing the NLRB's Order in *Dairylea*, "a union may find itself powerless to supply any real representation if it is unable to maintain the same steward continuously on the job." 531 F2d at 1166, n.7. Cf. *Paintsmiths, Inc.* v. *N.L.R.B.*, 620 F2d 1326, 1330 (8th Cir., 1980) (steward

superseniority clause limited to layoff and recall is presumptively lawful.) Other contractual measures which permit a steward's continued presence on the job, such as shift and overtime preference, are also lawful. See, e.g., *UAW Local 1331 (Chrysler Corp.)*, 228 NLRB 1446, 95 LRRM 1071 (1977).

B. *The disputed contract clause here does no more than ensure the continued presence of the steward on the job and is thus clearly lawful under Dairylea.*

In this case, §5(K) of the Addendum to the contract provides no superseniority whatever, even for purposes of layoff and recall. Nor does it provide union stewards with any economic benefit or any job benefit which is secured at the expense of other employees. All that §5(K) does is to prevent Wer-Coy from *arbitrarily* discharging its stewards. This minimal protection clearly furthers the legitimate goal of maintaining the continued presence of a steward on the job, which could otherwise be completely prevented by Wer-Coy's exercise of its asserted right arbitrarily to discharge its employees. The decisions below rejecting Wer-Coy's attacks on §5(K) are thus fully in harmony with *Dairylea*.

Nor do the other cases cited by Wer-Coy in the Petition conflict with the decisions in this case. Thus, *Teamsters Local 20* v. *N.L.R.B.*, 610 F2d 991 (D.C. Cir., 1979); *N.L.R.B.* v. *American Can Co.*, 658 F2d 746 (10th Cir., 1981), *Paintsmiths, Inc.* v. *N.L.R.B., supra*, and *Plumbers, Local 119*, 225 NLRB 1056, 107 LRRM 1190 (1981) all confronted job-related benefits to union officials which went far beyond the kinds of lawful protection necessary to ensure the continued presence of a steward to represent employees. Wer-Coy's heavy reliance on *Perma-Line Corp.* v. *Painters Local 230*, 639 F2d 890 (2d Cir., 1981) is particularly misplaced. In that case, an arbitrator interpreted a contract clause to prohibit any discharge at all of a steward without the consent of the union, regardless of cause. The court pointed out that under this "no-firing" clause

> [n]o matter what the shop steward's conduct — be it spitting in the face of the superintendent, slashing the tires of the foreman's automobile, throwing a monkey wrench into the paint mixing machine — as a shop steward, he is protected from discharge. 639 F2d at 896.

Not surprisingly, the court held that this absolute ban on discharge "is the ultimate benefit a union can give to a union member," *id.* An entirely different situation is presented here. Wer-Coy may discharge a steward forthwith for cause, and thus may immediately dismiss a steward guilty of impermissible conduct. The limited protection afforded stewards against arbitrary acts by Wer-Coy by §5(K) here — requiring only just cause for discharge — has obviously little to do with the complete immunity for misconduct afforded in *Perma-Line.* The conflict asserted by Wer-Coy between the decisions below and that of the Second Circuit in *Perma-Line* does not exist.

C. *The questions presented by the Petition are insubstantial.*

Even if the questions presented by the Petition have been properly preserved, they fail to raise any substantial issue for resolution by this Court. Contrary to Wer-Coy's assertion, no conflict exists between the decisions below and those of the NLRB and other Courts of Appeals. The limited, even minimal, protection afforded union stewards by §5(K) here is well within the presumption of lawfulness established by *Dairylea* and its progeny for contractual provisions which simply enable a steward to maintain his continued presence on the job.

In effect, the *real* question which Wer-Coy seeks to present to this Court is whether 29 USC §158(b)(2) prevents the union from protecting its stewards from arbitrary discharge — which is what acceptance of Wer-Coy's position would entail. Wer-Coy's attempt to dress this petty grab for power over the union stewards in its shop as an "important question of federal law" concerning unlawful pro-union discrimination is a monumental exaggeration. The questions presented by the Petition are insubstantial and do not warrant review by this Court.

CONCLUSION

For the above-stated reasons the Petition herein for a Writ of Certiorari to the Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

MARSTON, SACHS, NUNN, KATES, KADUSHIN & O'HARE, P.C.
BY ROLLAND R. O'HARE
ANN E. NEYDON
BRUCE A. RICHARD
Attorneys for Respondent
1000 Farmer Street
Detroit, Michigan 48226
(313) 965-3464

February 16, 1983

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EXCERPTS FROM SECTION 5 OF THE ADDENDUM TO THE STANDARD FORM OF UNION AGREEMENT BETWEEN LOCAL UNION #292, SHEET METAL WORKERS INTERNATIONAL ASSOCIATION AND ASSOCIATED METAL FABRICATORS AND ENGINEERS (AS AGENT FOR WER-COY FABRICATION COMPANY, INC.)

Section 5. STEWARDS

* * *

D. Stewards shall observe conditions of employment and conduct of employees to the end that the provisions of the Standard Form of Union Agreement and any addenda thereto shall be complied with and he shall immediately notify the Union office regarding the interpretation or application of the provisions of the Standard Form of Union Agreement and addenda thereto in connection with the employment of employees in shops or on jobs. Stewards shall not be discriminated against by the Employer in the performance of the duties herein stated.

* * *

K. The Employer shall notify the Union office seventy-two (72) hours, excluding Saturday, Sunday and holidays, prior to the discharge of a shop or job steward for cause. The Union will investigate (within the seventy-two (72) hour period) and determine the discharge of any steward for cause.

AWARD OF ARBITRATOR WILLIAM M. ELLMANN IN THE MATTER OF THE ARBITRATION BETWEEN WER-COY FABRICATION COMPANY, INC. -and- SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION 292 (AMERICAN ARBITRATION ASSOCIATION CASE NO. 54-30-1637-80)

AWARD

I restore Mr. Dubich to duty as of the date of his discharge, having determined there was an improper discharge and that he was legitimately trying to perform his duties as a Union steward. He is still entitled to representation under the *Weingarten* rule — representation which he was not afforded. Representation which he was in no position to request.

He is also entitled to his full benefits including wages and fringes for the period he was ready and available for work since that date.

Jurisdiction is retained solely to determine damages if the parties cannot resolve the question.

/s/ WILLIAM M. ELLMANN
Arbitrator

Date: 3/29/81

ANSWER OF DEFENDANT WER-COY FABRICATION COMPANY, INC.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 292, AFL-CIO, a labor organization,

Plaintiff, Case No. 81-71144

vs. Hon. John Feikens

WER-COY FABRICATION COMPANY, INC. a Michigan corporation,

Defendant.

ANSWER TO COMPLAINT

Defendant, WER-COY FABRICATION COMPANY, INC., by and through its attorneys, Fiott and Novara, P.C., answers Plaintiff's Complaint paragraph by paragraph as follows:

1. Defendant admits the allegations contained in paragraph one.

2. Defendant admits the allegations contained in paragraph two.

3. Defendant admits that this Court has jurisdiction over this matter pursuant to 29 U.S.C. 185, but denies that it breached its collective bargaining agreement with Plaintiff.

4. Defendant admits the allegations contained in paragraph four.

5. Defendant neither admits nor denies the allegations contained in paragraph five, being without sufficient information to form an opinion thereto and leaves Plaintiff to its proofs.

6. Defendant admits that an arbitration hearing was held on February 18, 1981, but denies that the issue submitted to arbitration was whether the discharge of Anthony Dubich was proper. Defendant further states that the sole issue before the

arbitrator was whether Defendant substantially complied with Section 5J (sic) of the Addendum to the parties' collective bargaining agreement.

7. Defendant admits that Arbitrator William M. Ellmann issued an Opinion and Award ordering reinstatement and backpay and further states that the Arbitrator exceeded the authority granted to him by Article X, Section 3 of the parties' collective bargaining agreement and failed to decide the issue submitted to arbitration.

8. Defendant admits that it refused to abide by the Arbitrator's Award and further states that such Award exceeded the authority granted to the Arbitrator by Article X, Section 3 of the parties' collective bargaining agreement.

9. Defendant denies each and every allegation contained in paragraph nine of Plaintiff's Complaint for the reason that the same are untrue.

WHEREFORE, Defendant Wer-Coy Fabrication Co., Inc., requests that this Court dismiss Plaintiff's Complaint and award Defendant its costs and reasonable attorney fees incurred in this matter.

FIOTT AND NOVARA, P.C.
BY: /s/ KENNETH J. FIOTT, ESQ.
(P13445)
Attorney for Defendant
1427 Parklane Towers West
Dearborn, MI 48126
313-336-4465

Dated: 5-1-81

AFFIRMATIVE DEFENSES

Defendant Wer-Coy Fabrication Co., Inc., for its affirmative defenses to Plaintiff's Complaint, states as follows:

1. That the Arbitrator failed to decide the issue submitted to him, that being whether Defendant substantially complied with Section 5K of the Addendum to the parties' collective bargaining agreement.

2. That the arbitrator exceeded the authority granted to him by Article X, Section 3 of the collective bargaining agreement.

3. That the Arbitrator's Opinion indicates that he did not decide this dispute from the facts presented at the hearing.

4. Plaintiff failed to state a claim upon which relief can be granted.

5. Defendant reserves the right to plead any additional legal or factual affirmative defenses which may be discovered during the course of this action.

FIOTT AND NOVARA, P.C.
BY: /s/ KENNETH J. FIOTT, ESQ.
(P13445)
Attorney for Defendant
1427 Parklane Towers West
Dearborn, MI 48126
313-0336-4465

Dated: 5-1-81

FEDERAL RULES OF CIVIL PROCEDURE, RULE 8(c)

(c) AFFIRMATIVE DEFENSES. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance of affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.